Report of
Federal/Provincial/
Territorial Family Law Committee

Child Support:
Public Discussion Paper

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CHILD SUPPORT:

PUBLIC DISCUSSION PAPER

The federal, provincial and territorial governments have been aware, for the past few years, of problems relating to child support upon family breakdown and consequently, directed the federal/provincial/territorial Family Law Committee to study the issue. The present Canadian system of determining child support, which relies heavily upon judicial discretion, is being seriously criticized by commentators and organizations, and a review of the system has been strongly recommended.[1] To assist in this review, the Family Law Committee has prepared this Discussion Paper, to provide information on alternatives for the determination of child support and to solicit the reader's input on the issues of substance raised in the paper.

The Committee's work on child support is divided into two major areas; (1) issues of substance and (2) economic implications of child support. Only the first part is being addressed in this Discussion Paper. Through this document, the federal, provincial and territorial governments intend to inform the public of the existing problems with child support and discuss different alternatives to the present system. This document also seeks comments on different issues of substance relating to child support which must be considered in detail before developing a solution to the problems. The comments received from this consultation on issues of substance will help determine which of these issues should be addressed and how they should be treated within child support guidelines, if guidelines are eventually developed. These comments may also assist in the choice of a particular model where an important issue is seen as being dealt with better within a specific model.

With respect to the work on the economic implications of child support, research studies to determine reasonable expenditures on children in Canada and to assess the economic effects of child support guidelines are presently being conducted. Special attention will also be given to our present taxation system and its effects on any new method of determining child support. Although certain types of guidelines will be described in this document for information purposes, opinions regarding preferred models are not expected. Such choices could only be made after an in-depth study of the relevant Canadian economic and financial information. A second report will be released

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[1] Payne, Julien D., *Spousal and Child Support Guidelines*, Report for the Department of Justice Canada, Oct. '88, p. I-22, I-23, Diane Pask and M.L.(Marnie) McCall, *How Much and Why ? Economic Implications of Marriage Breakdown: Spousal and Child Support*, Canadian Research Institute for Law and The Family, Calgary, Alberta, 1989, p. 133, National Council of Welfare, *Women and Poverty Revisited*, Summer 1990, p. 86-87. New Brunswick advisory Council on the Status of Women, *What Comes First? A Report on the Payment of Support Orders in New Brunswick*, August 1990, p. 17.

summarizing the relevant research and its applications, as an aid to making a final choice of any proposed child support guideline.

This discussion paper raises issues of policy relating to child support. The second, research paper, to be released in October, 1991, will focus on the economic data and the application of particular child support guidelines. The Family Law Committee encourages the reader to respond to both the issues of substance raised in the current discussion paper, as well as the discussion on the application of guidelines to be raised in the research report. Readers may wish to respond to the current report prior to receiving the research report, thereby focussing early on the issues raised in this discussion paper. Responses to both reports, however, should be received no later than the end of December, 1991.

Following a review of the responses to both reports, the Family Law Committee will be in a position to make a recommendation regarding a new approach for determining child support.

Your comments can be sent to:

Child Support Project
Federal/Provincial/Territorial Family Law Committee
c/o Department of Justice
Room 738
239 Wellington Street
Ottawa, Ontario
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and to your provincial or territorial Attorney General's Department or Department of Justice.

TABLE OF CONTENTS

1. **INTRODUCTION** 1

2. **DESCRIPTION OF THE PRESENT SITUATION AND PROBLEMS** 2

3. **OBJECTIVES AND PRINCIPLES OF CHILD SUPPORT** 6

A. Objectives of Child Support 6

B. Principles of Child Support 7

4. **POSSIBLE APPROACHES TO CHILD SUPPORT** 8

A. Status Quo 8

B. Maintaining the Status Quo but allowing the courts to consider Data on the costs of raising children to assist in the determination of children's needs 9

C. Adopting Child Support Guidelines 9

(i) ***TYPES OF GUIDELINES*** 10

(a) Sweden 10

(b) The United States 10

(c) Australia 11

(ii) ***ISSUES AND OPTIONS*** 11

ISSUE # 1: PARENT'S MINIMUM NEEDS 11

ISSUE # 2: MINIMUM CHILD SUPPORT ORDERS 13

ISSUE # 3: PARENTAL INCOME AND MEANS - NEEDS OF CHILDREN 14

ISSUE # 4: MULTIPLE FAMILY SITUATIONS 16

A. Needs of subsequent adopted or biological children 18

B. Needs of a dependant spouse or partner 21

C. Subsequent spouse's income 23

D. Needs of step-children 23

E. Pre-existing support obligations 24

ISSUE # 5: JOINT PHYSICAL CUSTODY, EXTENDED VISITING RIGHTS AND SPLIT CUSTODY CASES 25

A. Joint Physical Custody - Extended Visiting Rights 25

B. Split Custody: Both parents have at least one child in their custody 30

ISSUE # 6: CHILD CARE EXPENSES 31

ISSUE # 7: EXTRAORDINARY HEALTH EXPENSES 32

ISSUE # 8: DEFINITION OF "CHILD" 33

ISSUE # 9: VARIATION OF SUPPORT ORDERS 34

A. Criteria for variations 34

B. Process for dealing with variation of support orders 35

C. Treatment of existing child support orders following the implementation of any new system to determine child support 39

ISSUE # 10: EXTENT AND LIMITS OF CHILD SUPPORT GUIDELINES: ADVISORY, PRESUMPTIVE OR MANDATORY 39

A. Advisory 39

B. Presumptive 40

C. Mandatory 40

D. Others 40

5. **ANOTHER RELATED ISSUE: COMPENSATION FOR CUSTODIAL PARENTS' NON-FINANCIAL CONTRIBUTION** ... 41

6. **CONCLUSION** 43

ANNEX "A"

A. TYPES OF GUIDELINES 45

(i) **Sweden** 45

(ii) **The United States** 46

(a) The Income-Shares Model 46

(b) The Delaware (Melson) Formula 47

(c) The Flat Percentage of Income Model 48

(d) The Income Equalization Model 50

(iii) **Australia** 52

1. INTRODUCTION

Child support legislation in Canada is the responsibility of the federal government for orders under the *Divorce Act*. The provinces and territories on the other hand have jurisdiction for support legislation where divorce is not an issue, namely in cases of separation, for children of common law relationships or in paternity cases.

The major problems relating to current child support awards are:

- inconsistency between awards
- inadequacy of the amounts
- inequity of the system.[2]

Other countries in which similar problems were identified[3] have attempted to solve them, to a certain extent, by adopting child support guidelines.[4] However, it is important to note that where a family's overall financial resources are insufficient, a new method of determining child support cannot alone resolve the problem of adequacy.

The federal/provincial/territorial Ministers responsible for Justice announced the creation of the Child Support Guidelines Project in June, 1990. The Family Law Committee received the mandate to study child support guidelines in the context of the actual costs of raising children in Canada, within a broader study of support upon family breakdown.

This joint federal/provincial/territorial initiative received a substantial amount of support from every involved jurisdiction, the governments of which are seriously committed to resolving the problems of child support in Canada. Furthermore, if a new approach to child support should be developed, there are major advantages to proceeding in a manner as uniform as possible throughout the country, for the benefit of all children notwithstanding the marital status of their parents.

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[2] Payne, Julien D., *Spousal and Child Support Guidelines*, Supra, p.I-22

[3] "Lenore Weitzman's study of California families found that one year after divorce the standard of living of the custodial parent and children had declined by an average of 73% while that of the non-custodial parent had gone up by 42%, with an even greater disparity in upper income families." Weitzman, *The Divorce Revolution*, p. 323-356.

[4] In the United States, Congress passed in 1984, the Child Support Enforcement Amendments which required all States to establish guidelines for determining amounts of child support by October 1, 1987.

2. DESCRIPTION OF THE PRESENT SITUATION AND PROBLEMS

The determination of child support, whether under the *Divorce Act* or provincial and territorial legislation, is based upon the principle that both parents have an equal responsibility toward their children and should contribute in accordance with their own means to the needs of the children.

This formula is derived from the case of *Paras* v. *Paras*.[5] The comments of Kelly, J.A., in this case concern interim support for children but the formula is also being applied for permanent child support orders. The most important part of Kelly, J.A.'s statement concerns the formula for establishing support:

> "Ideally, the problem could be solved by arriving at the sum which would be adequate to care for, support and educate the children, dividing this sum in proportion to the respective incomes and resources of the parents and directing the payment of the appropriate proportion by the parent not having physical custody.
>
> Generally speaking, such a formula would tend to preserve a higher standard of living in the home in which the children are supported at the expense of some lessening of the standard of living of the other parent, thus creating indirectly a benefit to the parent who continues to support the children."[6]

Similar formulae are being applied within provincial legislation to determine support. For example, Article 635 of the *Civil Code of Quebec* reads as follows:

> "Art. 635. In awarding support, account is taken of the needs and means of the parties, their circumstances and, as the case may be the time needed by the creditor of support to acquire sufficient autonomy."

These principles for determining child support seem easily applicable but the results are not what was expected by Mr. Justice Kelly in developing the formula. It appears from numerous studies that in most cases custodial parents and children suffer from a lower standard of living than non-custodial parents:

> "Household incomes of the custodial parent are typically both below those of the non-custodial parent and shared between more persons (there are typically three persons in the custodial mother's household -- two children and herself -- and one person in the non-custodial parent's household, until new family relationships are

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[5] [1971] 1 O.R. 130, 9 R.F.L.328, 14 D.L.R. (3d) 546 (Ont. C.A.).

[6] *Paras* v. *Paras* (1971) 9 R.F.L. p. 332.

formed). It is rare that household incomes are equalized, let alone standards of living".[7]

The *Paras* formula may not have practical effects on child support orders since it may only provide a realistic rationale in families with two incomes where the disparity between both incomes is nominal. Furthermore, a strict application of this formula "to preserve a higher standard of living in the home in which the children are supported at the expenses of some lessening of the standard of living of the other parent" could provoke litigation over custody and create parenting disputes and enforcement problems. However, the existing disparity of standards of living between custodial and non-custodial households is disturbing and requires particular attention.

The recent federal evaluation of the *Divorce Act* exposes this disparity between the standards of living of men and women following divorce. The study reports that the proportion of men below the poverty line after paying support was 18% in 1986 and 16% in 1988. However, approximately two-thirds of women and children have total incomes below the 1988 poverty lines with support included. Where support is excluded (e.g. support may not be paid) approximately three-quarters of women and children live below the poverty lines following divorce.[8]

The data from the federal Central Registry of Divorce Proceedings reports that, for 1986, in 72% of the cases the wife received custody of the children, men received custody in 15.3% of the cases, joint custody was awarded in 11.6% of the cases, and in 1.1% of the cases custody was awarded to others.[9]

It, therefore, becomes obvious that the low levels of child support have a direct and essential impact on the standards of living of the children and custodial parents, who are the mothers in most cases.

In some cases the family's resources are simply insufficient to provide adequate child support. In these situations the problem of low child support awards is part of the larger problem of poverty in Canada, which is intensified by the onset of divorce. However, in other families the resources are available but they are simply not being shared in a manner that would allow all family members to benefit from similar standards of living following divorce. This is confirmed by the fact that such a larger

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[7] Rogerson, Carol J., *Review of Support Factors and Objectives in Case Law Decided Under the Divorce Act, 1985*, Report for the Department of Justice Canada, Dec. '89, p. 101.

[8] Department of Justice, Bureau of Review, *The Divorce Act Evaluation, Phase II: Monitoring and Evaluation*, May 1990, p. 94-95.

[9] Ibid, Table 4.18, p. 100.

proportion of women and children live in poverty following divorce. The fact that these resources are not being shared can be attributed to the method of determining support and the allocation of costs between the parents."[10]

Some courts, in establishing the principles of support, have decided as an aspect of fairness that the custodial parent should not benefit from child support. This approach has a direct effect on the children's standard of living. Since most custodial parents are the mothers with much lower incomes, if no spousal support is awarded (as in the majority of cases), it is inevitable that the children, living in the same household will be affected by that lower standard. Therefore, in these cases the objective of the *Paras* formula is not being met."[11]

The *Divorce Act* Evaluation also acknowledges the problems with the levels of child support:

> "For many years, child support awards have been criticized for being inadequate and thereby placing an unfair burden on the custodial parent. Comparison of [1985-6] and [1988] data suggests that there has been a deterioration, not improvement, in the average amount of child support awarded. In [1985-6], clients were, on average, receiving, or in the case of men, paying, $470.00 per month. In [1988], the average amount of child support reported by clients, is now $503.00 per month. Even with no improvement in amount ordered, we would have expected the average to be about $540.00 per month after taking into account inflation of four percent in each of the years separating the two sets of interviews."[12]

The first element of the present approach for determining child support is the establishment of the costs of children. The reliance on judicial discretion within the present system of determining child support means that custodial parents have the burden of establishing the costs of their children for the courts' consideration. There is growing concern that the costs of children are seriously underestimated by the judges, lawyers and by the parties themselves. In an attempt to resolve this issue, research studies are being conducted for the Family Law Committee to determine reasonable estimates of expenditures on children in Canada (to be released October, 1991).

The method by which the costs of children are allocated between the parents within the present approach for determining child support is also a source of concern. This

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[10] Rogerson, Carol J., Supra p.80

[11] Ibid, p.85.

[12] Department of Justice, *The Divorce Act Evaluation*, Supra, p. 81.

method of allocating costs between parents directly contributes to the low levels of child support.

Under the present approach, the costs of children, once established, are divided between the parents in proportion to their incomes. However, in general, women's incomes are much lower than men's, yet usually they are custodial parents and they are generally required to pay their proportional share of the children's costs. The legislation does not currently require judges to consider the question of whether parental income is sufficient to sustain them at a basic level before being required to contribute proportionally to the costs of children. Although some judges do account for personal reserves in the case of low income custodial parents, this is not a usual practice in Canada.

Another major problem with the present system of determining child support in Canada is that the amounts generated are generally inconsistent in similar family situations. It may be argued that although judges may be consistent in their own decisions with respect to the amounts awarded, there are great discrepancies between amounts awarded by different judges. Both child support recipients and child support payors are frustrated by these discrepancies, as they will often know someone who pays or receives more or less child support than they do. Uniformity of child support levels would most probably generate a sense of fairness and satisfaction towards the system. If amounts of child support became predictable and consistent for all individuals, the desire to comply with these orders may also improve and we may even see a decrease in current default rates.

Under the present method of determining child support, custodial parents have to apply to the courts for a child support order and they have the burden of developing and presenting the evidence. This burden in most cases is the responsibility of the mother who is the least able to pay the high legal costs associated with the process. After the initial support order is established, custodial parents do not often seek upward modifications even though circumstances may change and costs of raising children increase. Therefore, child support orders gradually lose their buying power and again the children will suffer from this inefficient and costly system.

Another problem is that custodial parents must always take the initiative and bear the costs for claiming child support, which may be unfair to them. A new system of determining child support could reinforce the idea that children have an inherent right to support, that this right should not be bargained with, save under exceptional circumstances, and that the role of custodial parents' is simply one of an intermediary.

Furthermore, the present approach for determining child support does not take into account the non-financial costs of children to custodial parents. Custodial parents will find that, in most cases, the amount of work they have to do on behalf of their children will increase considerably following the family breakdown due to the absence of non-

custodial parents' own personal contribution. This type of contribution is estimated by different Canadian and American studies to be approximately 20-27 hours per week.[13]

Non-custodial parents who do not have to provide this on-going care will have the opportunity of devoting these 20-27 additional hours per week to leisure and/or career and education advancement. Therefore, besides receiving inadequate amounts of child support, custodial parents, who in general have lower incomes than non-custodial parents, will also have considerably less time to devote to the advancement of their careers and/or education.

Although it may be argued that any type of compensation for custodial parents' non-financial contribution could be awarded by way of spousal support, we have evidence that spousal support awards are not granted frequently.[14] Furthermore, the work being compensated for may not have any relation to being a spouse since it is done on behalf of the children and continues after the termination of the spousal relationship. Finally, spousal support is not available to all custodial parents (e.g. where no permanent relationship existed between the child's parents).[15] Whether or not such compensation should be considered and whether it would be better addressed within child support, spousal support or a new category called custodial support, is also dealt with as a related issue within this document.

3. OBJECTIVES AND PRINCIPLES OF CHILD SUPPORT

The Family Law Committee concluded that the first step to a complete study of child support in Canada was the determination of a list of basic objectives and principles which should apply to child support in general and against which the possible options for child support should be applied.

A. Objectives of Child Support:

In order to be efficient, any method of determining child support should be applicable to a broad range of circumstances and yield equitable results at any income range. The

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[13] Diane Dodson, *Report Card on State Child Support Guidelines*, p.15. and Canadian Advisory Council on the Status of Women,. *Women and Labour Market Poverty*, p. 26.

[14] Department of Justice, Divorce Act Evaluation, p.74-5,; However, recent case law has shown some greater flexibility on this matter (Story v. Story, (1989) 23 R.F.L. (3d) 225, BCCA dismissing appeal from 16 RFL (3d) 216 BCSC.)

[15] Rogerson, Carol J.,Supra, p.86-88.

system should also be flexible in order to be applicable to a variety of circumstances and situations and still yield equitable results.

It is proposed that any method of determining child support should achieve the following objectives:

1. Yield adequate and equitable levels of child support.

2. Produce amounts which are objectively determinable, consistent and predictable.

3. Ensure flexibility to account for a variety of circumstances.

4. Be understandable and inexpensive to administer.

B. Principles of Child Support:

Any method of determining child support should include or take into account the following principles:

1 PARENTS HAVE LEGAL RESPONSIBILITY FOR THE FINANCIAL SUPPORT OF THEIR CHILDREN.

2 CHILD SUPPORT LEGISLATION SHOULD NOT DISTINGUISH BETWEEN THE PARENTS OR CHILDREN ON THE BASIS OF SEX.

3 THE DETERMINATION OF CHILD SUPPORT SHOULD BE MADE WITHOUT REGARD TO THE MARITAL STATUS OF THE PARENTS.

4 RESPONSIBILITY FOR THE FINANCIAL SUPPORT OF CHILDREN SHOULD BE IN PROPORTION TO THE MEANS OF EACH PARENT.

5 IN DETERMINING THE MEANS OF EACH PARENT, HIS OR HER MINIMUM NEEDS SHOULD BE TAKEN INTO CONSIDERATION.

6 LEVELS OF CHILD SUPPORT SHOULD BE ESTABLISHED IN RELATION TO PARENTAL MEANS.

7 WHILE EACH CHILD OF A PARENT HAS AN EQUAL RIGHT TO SUPPORT, IN MULTIPLE FAMILY SITUATIONS THE INTERESTS OF ALL CHILDREN SHOULD BE CONSIDERED.

 # 8 THE DEVELOPMENT OF ANY NEW APPROACH TO THE DETERMINATION OF CHILD SUPPORT SHOULD MINIMIZE COLLATERAL EFFECTS (E.G. DISINCENTIVE TO REMARRIAGE, JOINT OR EXTENDED CUSTODY ARRANGEMENTS AND VOLUNTARY UNEMPLOYMENT OR UNDEREMPLOYMENT) TO THE EXTENT COMPATIBLE WITH THE OBLIGATION TO PAY CHILD SUPPORT.

In your view, are the above objectives and principles of child support appropriate?

4. POSSIBLE APPROACHES TO CHILD SUPPORT

In an attempt to solve the problems of child support there are three possible approaches which could be adopted: (1) Simply maintaining the status quo, (2) Maintaining the status quo but allowing the courts to consider data on the costs of raising children to assist the determination of children's needs, and (3) adopting child support guidelines.

A. Status Quo

Although major problems with the present system of determining child support have been identified, there are advantages to this system. Maintaining the status quo could be a favoured option if it was felt that these advantages outweigh the problems.

The first advantage of the present system is that it allows flexibility to deal with every family's particular income and expenditure patterns, which are arguably quite different from others. Establishing a general method of determining support could be seen as ignoring such distinctions.

Secondly, the present system's flexibility also has advantages in the distribution of the parties' overall financial resources. The Courts, in making decisions and the parties themselves in negotiations, may make exchanges between property rights, lump sums and periodic sums for spousal support and child support. However, the opportunity for making such exchanges may also be criticized, as some custodial parents may voluntarily relinquish certain rights to their own and to their children's disadvantage in order to obtain the custody of the children.

As previously discussed, the main disadvantage of maintaining the status quo is that the present reliance on judicial discretion arguably produces inadequate amounts of child support, creates inequities, and reveals inconsistencies between awards in similar family situations. It could also be argued that there is a general dissatisfaction with the way

child support is currently being awarded as well as with the inevitable legal costs involved. In turn this dissatisfaction may contribute to the rate of default in the payment of child support.

In your view, is the present system of determining child support adequate?

B. Maintaining the Status Quo but allowing the courts to consider data on the costs of raising children to assist in the determination of children's needs

One of the major problems with the present method of determining child support is that the amounts required to meet children's actual needs are generally underestimated. An option would be for governments to study and select advisory data on expenditures on children to provide to judges, lawyers and the parties themselves. This approach would not change the current law and the operation of judicial discretion, but would simply seek to provide information which could help in reaching a settlement or in the exercise of judicial discretion. It may be necessary to expand the rules of evidence to permit the use of such information.

The essential weakness of this approach is that any data provided would necessarily be a reasonable estimate of average expenditures, while the current law requires the court to determine the needs of the individual child before it. Information on expenditures on children, then, would likely be seen as relevant but equally likely could be seen as simply the starting point for litigation in the individual case. If judicial discretion and costly litigation is truly part of the current problem with child support, this approach may not provide an adequate solution.

C. Adopting Child Support Guidelines

In the search for solutions to the problems of child support, certain countries and American states have developed child support guidelines. Different types of child support guidelines have been created by giving preference to different considerations. For information purposes, a brief description of different types of guidelines is set out below. You may refer to Annex "A" for a more precise description of the models as well as for examples of how they work.

N.B. -- This Discussion Paper does not seek the readers' views on which model they would prefer, nor should one attempt to determine whether one of these guidelines is the most appropriate in the Canadian context until all relevant financial and economic information becomes available. Different types of guidelines and possibly even new or hybrid models will be tested as well as the tax implications on amounts generated through child support guidelines. Only when such studies are completed will it be appropriate to determine a preferred approach to guidelines in a canadian context. As noted earlier, it is expected that a report outlining this data and its application will be produced within six months.

(i) TYPES OF GUIDELINES

(a) Sweden

Sweden's child support guidelines integrate the public and private law system of financial support for children. The amount of child support is determined in proportion to parental means.

The State guarantees that children will at least receive a basic sum if parents do not provide minimum support.[16]

(b) The United States

Different types of child support guidelines are now in use in the United States: the Income Shares Model, the Flat Percentage of Income and the Delaware-Melson Formula. Another formula which has been developed in the United States but which has not been adopted by any State is the Equalization of Standards of Living Model.

(1) The Income-Shares Model:

The basic principle behind the Income Shares Model is that a child should receive the same amount of parental income which he or she was receiving before the family breakdown in proportion to each parent's income.

(2) The Delaware (Melson) Formula:

The formula ensures that the parents' and children's basic needs are met before the parents or the children are allowed to share in any remaining income.

(3) The Flat Percentage of Income Model:

The established percentage for this model is determined by studies on expenditures on children, and it is assumed that both parents will spend the same percentage of their income on the children. Application of the model, however, only determines the non-custodial parent's share.

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[16] David Bradley, *Financial Support for Children, The Swedish Example*, September (1990), Family Law, p. 349-351.

(4) The Income Equalization Model:

The basic principle underlying this model is that the child should suffer the least possible reduction in his or her standard of living as a consequence of the family breakdown. This is achieved by equalizing the standards of living of both custodial and non-custodial households.

(c) Australia

The establishment of child support awards in Australia is based upon the parents' incomes and the established percentages are determined as a result of research on family spending. Australia has developed six different child support formulae to cover different circumstances.

(ii) ISSUES AND OPTIONS

A study of child support guidelines raises a number of issues, which, in turn, generate different options to be considered. Preferring one of these options over others will help in choosing a guideline model. The stated options for every issue are not limitative, and the reader's comments on other options or issues not addressed in this paper are welcome.

ISSUE # 1: PARENT'S MINIMUM NEEDS:

Principle number 5, above, states that in determining the parent's means, his or her minimum needs should be considered. When resources are sufficiently great this issue will not be a problem. However, when the resources available to the family are simply not enough to meet everyone's needs, priorities must be established.

Options:

There are two options regarding this issue. The first option is to not have a specific parental reserve, allowing for the parent's needs only the difference between the determined amount for the child and the parent's total income.

The second option is to create a specific reserve for parents which would be excluded from their income before determining the amount available for child support (parental self-support reserve).

Giving priority to the children over parents' basic needs is arguably not a realistic option in low income cases. Non-custodial parents may simply default on the support payment if not allowed to keep a basic amount for themselves out of

their limited resources. Clearly, parents cannot pay support if they cannot feed and house themselves. In such situations, the burden of supporting the children will fall on custodial parents. If custodial parents' resources are also insufficient, the state will assist on the same basis as other low-income families. Any parental reserve must, therefore, be limited to the amount needed to meet minimum needs.

In the models described above, self-support reserves are used in different countries and in certain American States and they are always set at minimum levels. In the United States they vary between $450 and $550(U.S.) per month. In Australia the self-support reserve is established at $538/month(Aus) or $587/month(Cdn).

If a self-support reserve was created within child support guidelines in Canada, a decision would have to be made respecting the level at which to establish such a reserve. The amount would obviously be set at a level designed to provide only for the parents' minimal needs.

The following questions would have to be addressed:

- How should parents' minimum needs be accounted for?
- Would national low income cut-offs be used?
- Would the basic personal amount as determined by the *Income Tax Act* be used?
- Would provincial welfare levels be used?
- Would a self-support reserve vary depending on income?
- Would a self-support reserve be adjusted yearly?
- Would a self-support reserve take into account other dependents (see section on multiple families below)?
- Would the amount of a self-support reserve vary depending on the province of residence?
- Could a national self-support reserve be established for orders under the *Divorce Act*?

Obviously, a policy decision to create a specific self-support reserve would have a significant effect on the choice of guideline. However, the financial testing of different formulae may demonstrate that guidelines with and without self-support reserves do not produce dramatically different results. Therefore, although in

theory a self-support reserve may appear desirable, a specified self-support reserve may not be necessary to achieve equitable levels of child support.

ISSUE # 2: MINIMUM CHILD SUPPORT ORDERS

Minimum child support orders, notwithstanding a parent's limited means, could have a major symbolic effect. In many cases, this type of order could serve to instill in parents a sense of responsibility towards their children. Such an order reinforces the notion that having children is a long term financial commitment recognized by the laws of this country. If duly enforced from the start, such orders would also serve to help trace support payors and to monitor their income as they grow older and possibly work their way out of poverty. Minimum child support orders could, however, be seen as unfair, since such orders would force parents to provide for their children in cases where they would simply not have the means. Furthermore, if welfare legislation does not allow support recipients to receive minimum child support awards without having to reimburse the social assistance program the equivalent of the amount received, support enforcement may not be attempted or encouraged in many cases. Furthermore, if proper enforcement is not attempted for these cases by the jurisdiction, for example because of the high costs involved in relation to the benefits provided, these orders would ultimately lose their symbolic significance.

In many cases, judges are already awarding such symbolic orders, but there is apparently no consistent practice with respect to minimum orders in Canada.

- Consequently, in your view, should there be mandatory, minimum child support orders?

A policy decision in favour of establishing minimum child support orders would raise certain questions:

- What amount is a proper minimum amount?
- Under what income level should minimum orders be established?
- How to treat welfare recipients who are also support payors or support recipients, and who are subject to such minimum awards?
- Should such orders be enforced as any other order?
- How would these orders affect the enforcement systems? Could a separate count of such orders be kept in order to identify them within the jurisdiction's total default rate?

ISSUE # 3: PARENTAL INCOME AND MEANS - NEEDS OF CHILDREN

Under the present system of determining child support, parental income and means are recognized as having a direct effect upon the needs of children. In divorce cases and in cases of separation, the parties pre-divorce or pre-separation standard of living is used to determine the needs of the children. However, this standard of living is in reality out of reach in many cases where the whole family's standard of living falls, at least for some time, following a breakup. Furthermore, in certain cases a "pre" standard of living may not be possible to establish, for example where the parents had no previous common standard of living. Finally, where a non-custodial parent's standard of living increases in the years following the breakup, the criteria of the former standard of living does not ensure children continued participation in the increase.

The present criterion of considering the pre-divorce, pre-separation standard of living in determining child support awards, not being always realistic nor otherwise applicable for every situation, should be redefined. Principle # 6 above, therefore, provides for a more general measure which still seeks to provide children with an appropriate standard of living similar to what they would have enjoyed if the parents had been living together. The general assumption behind this principle is that child support should be established in relation to parental means, therefore ensuring them a standard of living in direct proportion to what their parents can provide.

Since children's needs are usually underestimated in the establishment of child support, there are advantages to pre-determining children's needs within child support guidelines. Different levels of child support could be established. Children's needs could be limited to what is required for them to survive: minimum or basic needs of children. On the other hand guidelines could seek to pre-determine a level which would allow children to benefit from their parents' total means, as they most probably would have had the family remained intact.

Obviously, setting child support guidelines to account only for children's very basic needs would not solve the above described problems with child support. However, pre-determining child support awards to account for the discretionary income that parents' spend on their children over and above their very basic needs could be criticized as being an interference of the state in private matters.

However, although governments do not interfere in parents' discretionary spending on children where the family lives together, when called to determine child support in cases of family breakdown, the courts' parens patrae jurisdiction requires them to consider discretionary spending. This power of the courts reflects societal expectations which are otherwise satisfied by social pressure and expectations in intact family situations. It is important to note that social pressure is absent in many cases of family breakdown as the parents live in different communities. The exercise of the court's authority is also supported by

research demonstrating that first family children are not provided for in an equal manner as are subsequent family children. Thus, leaving discretionary spending on children to the individual's choice is unfair to children and may contribute to the increase of troubled children who will require state resources in the education, health and justice areas.

Child support guidelines would most likely determine the amount of children's needs by way of percentage or by proportional attribution in direct relation to parental income. Children's needs would ultimately vary in different income categories. Thus the need for an accurate determination of parental means. However, because data may not be available for cases of combined incomes over $180,000, child support guidelines would most probably create a ceiling at that level, above which child support would most probably be left to the discretion of the courts.

As currently is the case, detailed financial disclosure would have to be provided by both parties before support could be established. This financial disclosure should indicate every source of income and the amount, all assets, interest, yearly retirement savings etc. A copy of each parent's income tax statements for the last three years should also be attached. The income base to be used would most probably be gross, unless net income is used to determine children's needs.

Expenditures and debts for both personal and business purposes should also be stated. However, these expenditures and debts could be presumed not relevant in the determination of support unless clearly incurred to earn income or purchase assets, and they should be reasonable with respect to all the circumstances.

Although debts cannot be ignored, they should be dealt with after the determination of child support and not before as is the current practice. If it is established that the amount of debt is much higher than the norm, that payment of these debts is totally incompatible with the determined child support obligation and that there is no possibility of further abatement of these debts, judges may require discretion to reduce the pre-established amount of child support. Furthermore, consideration should also be given to the nature of these debts and if they were not incurred for the family's benefit no reduction should be granted; if the payor is incapable of paying the full amount, arrears should accrue. Such a policy would discourage child support payors from incurring personal debts in order to avoid or reduce the amount of child support. In sum, child support obligations should be a priority.

Both parties should receive the other's financial statement and if required, could challenge its content before the courts. Generally, in the exercise of their discretion to determine parents' income, guidelines could provide directions to the courts to maximize such income in order that children may benefit from the highest possible standard of living that the parents can provide.

A court could attribute income to either parent where :

- the assets are found to be underproductive.
- the income is found to have been diverted to reduce or increase the amount of or to avoid paying child support.
- assets should be liquidated to provide income which is necessary to maintain a child at the highest possible level of support.
- a parent receives benefits of ownership or employment, or
- there is voluntary underemployment or unemployment which is not required by a child's needs or by a parent's reasonable educational needs.

The courts could also attribute assets and income from other sources if deemed reasonable in all the circumstances.

Under child support guidelines, where parental means are in question, judicial discretion would remain an important part of the process. However, once income is determined, the child support award could be established almost automatically. Litigation would, therefore, be limited to more complex cases where the parties probably have more resources. Where the amount of income is not disputed, litigation would generally be avoided.

With respect to this section, the following questions must be addressed:

- What should be the relationship between parental income and means, and the measure of the child's needs?
- Should guidelines pertain to discretionary income above and beyond basic needs?
- When should income be attributed?

ISSUE # 4: MULTIPLE FAMILY SITUATIONS:

With the growing number of divorces and remarriages in Canada, multiple family situations are not the exception any more but, rather, are common. Although we have no specific data regarding the creation of new families in Canada we can probably assume that our situation is similar to what is found in the United States:

> Data collected by the National Centre for Health Statistics showed that of the remarried men in a national study group:

40 percent had or expected to have new biological children (but did not have stepchildren);

25 percent had new stepchildren (but did not have or expect to have new biological children); and

23 percent had or expected to have new biological children, and also had new stepchildren.

Thus, 88 percent had or expected either new biological children, or stepchildren, or both.[17]

Under the present approach for determining child support, which relies upon judicial discretion, where the means are sufficient the courts do not necessarily reduce the amount of child support due to new family obligations.[18] However, where there are simply insufficient means, the courts may give more consideration to second families and reduce the support obligation to the first family.[19] In short, there is no consensus on how to deal with second or multiple family situations in Canada. Children are again receiving different treatment in similar family situations.[20]

The growing number of subsequent family situations and the desire for a uniform method of dealing with child support should prompt the inclusion of specific provisions for the treatment of subsequent families within child support guidelines. There are different possible ways of treating multiple family situations. We will, therefore, study how subsequent families may affect the previous family's child support order and how pre-existing obligations may affect the determination of a new child support order.

The issue of subsequent families will generally be raised in the context of motions to vary pre-existing child support orders, sometimes following enforcement proceedings. The obvious reason is that upon the original determination of a child support order, new dependants are not usually present.

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[17] Marianne Takas, *The Treatment of Multiple Family Cases under Child Support Guidelines*, American Bar Association Centre on Children and the Law, p. 3.

[18] Norris Weisman, *The Second Family in the Law of Support*, Reports of Family Law, 3 R.F.L. (3d), p. 269.

[19] Norris Weisman, Supra, p. 269.

[20] Simon R. Fodden, *Poor Relations: The Effect of Second Families on child support*,Canadian Journal of Family Law, 1980, vol. 3, p. 210-211.

In determining how to respond to the issue of second families, specific issues particular to the presence of a subsequent family need to be considered:

a. Needs of subsequent adopted or biological children
b. Needs of a dependant spouse
c. Subsequent spouse's income
d. Needs of subsequent step-children
e. Pre-existing support obligations.

A. Needs of subsequent adopted or biological children

Having subsequent adopted or biological children will increase support payors' financial responsibilities and may reduce their means sufficiently to prompt a claim to reduce the amount of their child support orders. Different approaches to second family situations would treat subsequent children differently. The three major approaches are the first family first approach, the second family first approach, and a balance between families.

Options

1. First family first approach

The first family first approach is based upon the view that first families should not be affected by the voluntary decision of parents to subsequently create new families if they do not have the means to meet their present obligations. This approach has been described as a "first mortgage approach" for the preferential treatment given to the first children.

Under a first family first approach the needs of subsequent children would not justify a reduction of support orders for the children of first families. Any child support guidelines could ensure that the arrival of subsequent children would not reduce prior child support orders.

Furthermore, where child support orders were being determined for children of first families where subsequent children (of custodial or non-custodial parents) already exist, the needs of subsequent children would not be taken into consideration.

Within a first family first approach, the needs of subsequent children would not be considered where variations are sought to increase existing child support orders. This approach would allow the children of the first families to continue their existence as if subsequent families did not exist.

The main advantage of a first family first approach is that the children of first families, who may already feel neglected due to the family breakup, will at least be ensured of having their level of support determined without regard to whether their parents opt to have new children or not. Furthermore, this approach seeks to encourage adults to act in a mature fashion and not undertake new responsibilities which they cannot handle financially.

However, this approach may be perceived as discouraging the creation of new families and may penalize children of a second relationship where the parents' means are insufficient. As well, it may unrealistically expect support payors to live up to their obligations in the face of obvious unmet needs of the children in their current households. This approach, then, may lead to high levels of default in the payment of support orders.

2. Second family first approach

This approach elects to give priority to new families over first families. Where resources are insufficient, parents would be in a position to provide for their present family before supporting dependants they are not living with. This approach would allow child support payors to claim a reduction of their child support orders whenever subsequent children are born.

Where parents have sufficient means to adequately provide for both families, the effects of this approach would be less serious. However, it could still affect the first family children since the original child support order would likely be reduced to a certain extent.

A second family first approach could be implemented within different types of child support guidelines and could also vary whether the subsequent children were born to custodial or non-custodial parents.

The main advantage of this approach is that where the parents' means are insufficient to adequately provide for second families, child support debtors will be allowed to give priority to the family with which they are living. The main disadvantages of such an approach is that the standard of living of the children of first families' will be at the mercy of non-custodial parents and these children may be penalized for non-custodial parents' decision to undertake new responsibilities for which they do not have the means.

3. Balance between families

Since giving preference to either first or second families may appear unfair to the other, a balancing of the two may be an appropriate solution. Adopting an

approach which balances both families' needs and means would have the advantage of equity and fairness for all concerned.

For example, non-custodial parents could be allowed to claim increased expenses due to the arrival of subsequent children only where an increase in support is being sought by support recipients. This would protect original child support orders of first families until they require an increase, at which time a complete re-evaluation of both parents' situation should be effected. This type of balance between families is in effect in the State of Colorado.

Child support guidelines could also provide that first families' support orders should not be reduced where second families enjoy a higher standard of living. In New York State, such guidance has been given within the legislation and the results show a dramatic reduction in the number of requests for downward modifications following the arrival of subsequent children while providing a remedy for cases where relief is really needed.[21]

Child support guidelines which would seek to equalize both families' standards of living would ensure that both families resources are distributed and balanced. Such an approach would not preserve the rights of children of either family but would seek to treat them equally at all times.

Reductions of previous child support orders could be allowed due to the arrival of subsequent children but in accordance with a particular formula. For example, in the determination of parental income available for child support, a deduction could be allowed for subsequent children but the amount would be set at a lower level than the established guideline amount for child support. In such cases subsequent children would be granted a smaller percentage of their parents' total income than the first family's children but that percentage would be applied to a larger amount and they would also benefit from all additional income. This method is being applied in the State of Michigan.[22]

Another possibility would be to add together all children of non-custodial parents and determine the guideline amount for that number of children. The amount would then be divided by a number equivalent to that parent's total number of children. The portion for the subsequent children would then be deducted from the parent's total income and the guideline amount determined with respect to the balance of the income for the child support of the first family children.

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[21] Marianne Takas, Supra, p. 33.

[22] National Centre for State Courts, Supra, p. 455-6.

e.g. ncp's income = $1000 per month (non-custodial parent)
one child = first family
one child = second family
guideline amount for one child (i.e.) = 20 percent or $200
guideline amount for two children (i.e.) = 26 percent or $260
$260 x.5 = $130
$1000 - $130 = $870
$870 x 20 percent = $174
$174 would be the amount of child support for the child of the first family.[23]

If a method for determining support provided for a basic self-support reserve for parents, adjustments to the reserve could be allowed to reflect the basic needs of subsequent children, before determining the needs of the first family's children. Such a system is in place in West Virginia [24] and in Australia where child support orders are also re-assessed every year.[25]

B. Needs of a dependant spouse or partner

In most cases where parents have subsequent spouses or partners, the subsequent partners will be working and their income will allow those couples to benefit from a substantially higher standard of living than persons without a spouse or partner. However, where subsequent spouses or partners are dependant, those households' standards of living may fall dramatically.

Under the present system, where subsequent spouses become dependant, parents can seek a variation of their previous child support orders, pleading for a reduction due to their increased obligations. However, it is far from certain that a reduction will be granted since children are usually given priority over new dependant spouses.

Child support guidelines could establish a specific policy with respect to adult dependants. Different options could be considered: Dependant spouses could justify reductions of prior child support obligations, dependant spouses could have no effect on prior child support orders, or a balance of the two positions could be reached in certain cases.

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[23] This method is being used in the District of Columbia, Marianne Takas, Supra, p. 31 and the National Centre for State Courts, Supra, p. 143.

[24] National Centre for State Courts, Supra, p. 992.

[25] The Child Support Assessment Scheme, Supra, p. 15.

Options

1. Dependant spouses may justify reductions of prior child support orders

Spouses may have a legal obligation to provide for each other. Where resources are definitely insufficient and subsequent dependant spouses are incapable of working due to failing health or other justifiable reason, this option could arguably be seen as equitable. Furthermore, if no reduction, whatsoever, is allowed due to a subsequent spouse's dependency, the second family could be living at a lower standard of living than the first family. This may be seen as a problem where the non-custodial parent would have to deprive his current spouse of basic needs to continue the support of the first family.

2. New spouses' dependency does not justify reductions of prior child support obligation

Arguably, when parents take on subsequent spouses they already have certain obligations toward their children and these obligations should not be overridden by the fact that subsequent spouses may at some point become dependant. Furthermore, in a society where ex-spouses are strongly encouraged to become independent from the other upon the family breakdown, a general policy of allowing reductions whenever a subsequent spouse becomes dependant may seem quite unfair and children would be prejudiced for their parent's decision to have a new dependant.

3. Balance between the families

The Cassetty model, which considers new spouses' income, would equalize the two households. This would most probably result in a reduction of the child support order where non-custodial parents have new dependant spouses.

A balance could also be achieved by establishing a policy where dependant spouses would justify a reduction of a prior child support order only where they are incapable of working.

Another way a balance could be achieved would be by establishing that new spouses' dependency may justify a reduction of the prior child support order only where the second family's standard of living is lower than the first family's. However, (except under an equalization of standards of living approach) such an approach may be criticized for not treating both families equally. In effect, under most child support models, it is an accepted fact that where the children live with the lower income earner, their standard of living would definitely be inferior to the non-custodial household and no remedy would be offered.

C. Subsequent spouse's income

The treatment of subsequent spouse's income arises as an issue both where the paying parent establishes a new relationship and where the recipient parent does so.

Under the present system of determining child support, the income of subsequent spouses is not usually considered in the determination or variation of child support orders (some judges, however, do consider this income to determine a parent's living expenses, but this is not a universal practice).

Since subsequent spouses have no legal obligation toward their current spouse's children (unless they have voluntarily acted *in loco parentis*), counting their income in a determination or variation of a previous child support order may be unfair. Therefore, within child support guidelines, new spouses' income could be ignored completely.

However, since subsequent spouses will, in most cases, contribute to that household's standard of living, considering the new spouse's income could arguably be justified, at least to the extent that it will reduce the parent's living expenses.

Another situation where new spouse's income could be taken into consideration is where a parent decides to stay home to care for children other than those for whom the child support order is being established. Such a situation would be made possible because of the new spouse's income. The parent would, therefore, have reduced or no resources available for the children whose support order is being determined. In Hawaii the child support guideline in effect provides that in such cases, the parent's income will be "deemed to be up to 50% of the combined gross income of the parent and spouse."[26]

D. Needs of step-children

Although step-parents do not initially have a legal obligation towards their step-children, a legal obligation can develop by their voluntary behaviour where they act *in loco parentis*. If both parents of these children cannot provide for them, non-custodial parents living with these children may feel an obligation to assume financial responsibility for them. However, providing for step-children should

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[26] Marianne Takas, Supra, p. 26, and National Centre for State Courts, Supra, p. 191-2.

arguably not create a legal obligation which could override the rights of a parent's biological or adopted children from a previous union.

In the State of Michigan, where the issue is addressed, step-parents are deemed to contribute only one-fourth of the guideline amount to step-children, subject to strict conditions.[27]

Where the *in loco parentis* relationship results in a child support order, however, that order should receive the same treatment as all pre-existing support orders. (See Section E, below, on pre-existing orders.)

E. Pre-existing support obligations

A parent's pre-existing obligation could be in the form of spousal support or in the form of child support. Income could also be increased by virtue of support received from an ex-spouse. The issue of pre-existing obligations would arise in most cases where child support orders are being determined for children of subsequent relationships.

One approach to this issue could be that the amount of an individual's previous child or spousal support order could be deducted from his or her available income before determining the new child support order. Amounts received as spousal support from a previous union would logically be included in a person's income in determining child support. A person receiving child support for a child from a previous union would not be required to add this amount to his or her total income for the determination of the new child support payments, since that amount is deemed for the child and that child's expenses would not be part of the budget under consideration.

This approach is realistic, for it reflects the financial situation of the payor during the existence of the subsequent relationship (where the previous order existed) and will simply continue upon the breakdown.

The State of Wisconsin has adopted the following approach: both pre-existing and subsequent children have priority over the children for whom the court is determining support. Therefore, if the children before the court are the children of a second union, where a parent has children from three relationships, the

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[27] Marianne Takas, Supra, p. 34 and National Centre for State Courts, Supra, p. 457-8.

second family children will be allowed to share only in the remainder after the deduction for the first and third family children.[28]

Another option would be to re-evaluate both families' needs upon the breakup of the second family. Such an approach has been adopted in Australia where a specific formula has been created for cases where a parent has to pay child support to more than one custodial parent.[29] This approach could be viewed, however, as providing the second family with more resources than available during the relationship and it would also penalize the first family for the breakup of the second family, a situation over which it had no control.[30]

The questions to consider regarding this section are:

- Should the issue of multiple family situations be addressed within child support guidelines?

- How should multiple family situations be dealt with?

ISSUE # 5: JOINT PHYSICAL CUSTODY, EXTENDED VISITING RIGHTS AND SPLIT CUSTODY CASES

A. Joint Physical Custody - Extended Visiting Rights:

Joint physical custody situations and extended visiting rights are becoming more and more common in Canada, particularly due to the advent of mediation.[31] This issue must, therefore, be addressed in a general study on child support.

In other jurisdictions, extended visitations pursuant to custody orders are considered to be those in excess of 20-30% of overnight access. In both joint physical custody situations and in cases of extended visitations, support orders are often reduced to compensate parents for their contribution during the time spent

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[28] Marianne Takas, Supra, p. 29 and National Centre for State Courts, p. 1000-1001.

[29] The Child Support Assessment Scheme, A User's Guide, (Australia) p.34.

[30] Marianne Takas, Supra, p.18-23

[31] Pask, E. Diane, *The Effect of Maintenance of Custody Sharing*, C.J.W.L., vol.3, 1989, p. 156.

with their child.[32] However, consideration should also be given to the general increase of children's costs in such circumstances.

> " Where parenting is shared, the total expenditures on behalf of the child increase. The increase in overall costs does not proportionately reduce the expenses of either parent, since the fixed expenses of one are unaffected by the child-related expenditures of the other. Figures suggesting that at least 62% of total costs are fixed should be viewed with caution, as these calculations are based on the costs of raising children in intact, two-parent households (Getman, 1988). The costs of shared parenting are much higher. Espenshade's 1984 findings suggest, and Colorado has proposed, that basic child support levels be increased by 50% to account for the additional costs in cases of shared custody before any adjustment downward can be made in the amount of support required (Williams, 1987). This recommendation has been adopted by the Child Support Consultative Group (1988) in Australia."[33]

There are different possible approaches to dealing with the issue of joint physical custody and extended visitations upon the determination of child support. The possible approaches are: no reduction is allowed, proportional reductions are allowed, reductions are allowed with increased costs of children, reduction are allowed only on food and recreation items.

1. No reduction is allowed

The first option is to not allow any type of reduction of child support in cases of joint physical custody or extended visitation. Such an approach would be favoured for different reasons.

Joint physical custody and/or extended visitation could be requested by one parent only to obtain a reduction of his or her support payment but without any guarantee that the parent would respect the agreement and spend the increased time with the child. The custodial parent would then be forced to go back to court and seek a variation of the child support order.

Allowing reductions of support orders where extra time is spent with a child could also create a disincentive for custodial parents to accept extended visitations, since additional visitation time would be perceived as requiring

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[32] Ibid, p. 166-168.

[33] Pask, E. Diane, and McCall, M.L., *How, Much and Why Economic Implications of Marriage Breakdown; Spousal and Child Support*, Canadian Institute for Law and the Family (1989) p. 90.

reductions of child support. Furthermore, increases in visitation may not reduce custodial parents' expenses toward children sufficiently to justify reducing the amount of child support proportionately. It also appears that in cases of joint custody and extended visitations, the overall costs of children increase substantially. For example fixed costs could be the rent or mortgage, utilities, auto-related expenses, clothing, medical, or dental expenses.[34]

Therefore, granting reductions without taking into consideration the extra costs of joint custody and extended visitations may not be in the best interests of the child. The State of California opted for this approach:

> "The Senate Task Force (1987) concluded that decreased support in joint custody arrangements is likely to be detrimental to children because: (1) it provides an incentive to bargain over custody; (2) it can lead to further disparities in standards of living between parental households, thus undermining the adequacy or equity of child support awards, and (3) it is detrimental to children's emotional well-being."[35]

The main disadvantage of not allowing reductions of support in cases of joint custody and extended visitation is that support-paying parents may feel that they are not financially compensated for their increased child-related costs, and this could become a disincentive to joint custody.

2. Proportional reductions are allowed

The second option is to allow a reduction of the amount of support in direct proportion to the time spent with the support-paying parent over and above a specific threshold. The necessity of an established threshold stems from the fact that parents will not incur substantial costs until they spend more than a minimum amount of time with the child and support receiving parents will not incur substantial reductions of costs below that threshold.[36] Usually, access visits are between 20% and 30% overnight and the threshold should not, therefore, be under that amount. It has been said that the 20% threshold of some jurisdictions is too low (Getman).[37]

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[34] Pask, E. Diane, *The Effect of Maintenance on Custody Sharing*, Supra, p. 172.

[35] Pask, E. Diane, and McCall, M.L. *How Much and Why?* Supra, p. 91.

[36] Robert Williams, supra, p. II-56.

[37] Getman, Karen A., *A critique of the Effect of Non-Traditional Visitation and Custody arrangements on Child Support Awards Under Current Guidelines and Formulas*, Women's Law and Policy Fellow, Women's Legal Defense Fund,

Above the established threshold, a deduction equivalent to the amount of time spent with the paying parent would be applied to the total support order. This method is also known as the proportional decrease approach, which is adopted in different American guidelines.

This method would have the advantage of encouraging non-custodial parents to seek more time with their children by recognizing the increased expenses and by giving them a financial break. However, it may also bring about a disincentive to custodial parents to allow their children to spend additional time with their non-custodial parent in view of the financial consequences.

Furthermore, even over the established threshold, a proportional reduction of the child support order may unjustly reduce the amount of child support in relation to the costs of the child. Where such a formula is being applied, it has been criticized for creating a disproportionate reduction in child support. This is referred to as the "notch problem".

> "For example when visitation reaches the magic number (30 percent) the non-residential parent reduces the support payment by 30 percent and the residential parent hands over a 30 percent support payment. Yet, the increase in visitation from 29 percent to 30 percent does not result in a decrease in the expenses of the residential parent's child-rearing expenses to that extent."[38]

Such an approach also has the disadvantage of not taking into account the general increase of the child's costs in cases of joint custody and extended visitations. Therefore, the primary or other custodial parent will not see the expenses of the child reduced in the same proportion as the amount of time spent with the other parent. An inevitable consequence will be increased disparity between the standards of living of both households. (See footnote 35 above).

Finally this method could also provide an incentive for parents to seek joint physical custody or additional access rights simply to reduce the amount of child support payable, and then not exercise the rights in accordance with the time allocated by the order. Custodial parents would have to, therefore, return to court to have the support order varied accordingly, and they may not have the means to pay the legal fees involved.

One way the above-described method could be applied in a modified form would be to provide for a visitation abatement which is not proportional, but which

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August 1986, from Essentials of Child Support Guidelines, Supra, p. 130.

[38] Pask, E. Diane, *The Effect of Maintenance on Custody Sharing*, Supra, p. 172.

represents only 50% of the respective amount of child support for the time spent with the non-custodial parent over and above the determined threshold. This would then take into account the fact that the custodial parent will still have basic costs to meet. This method is applied in the State of Michigan.[39]

In Australia, a specific formula has been devised for cases of joint physical custody and extended visitation, which considers a parent's financial contribution in extra child care time. It has, however, the major disadvantage of not considering the increased costs of these arrangements. However, the threshold is set at a higher level than in most American guidelines.[40]

3. Reductions are allowed with increased costs of children

A third option would be to increase the costs of children by 50% and then divide the amount in proportion to each parent's time with the child over and above the established threshold. Such a method of dealing with joint physical custody and extended visitation has been in effect in Colorado since 1987. It appears that this approach has experienced a considerable amount of success in Colorado since it recognizes the increased costs of children in joint custody situation as well as both parents' financial contribution during the extra time spent with them. Furthermore, this method reduces or eliminates the notch problem discussed above. Other states, such as Vermont, have also adopted this approach.

4. Reduction allowed only on food and recreation items:

This other option for dealing with joint physical custody and extended visitations is suggested by Karen Getman:

> 1. Estimate that approximately 30% of expenditures are being borne by the non custodial parent during periods of extended visitation (based on Espenshade's estimates that food and recreation would add up to 30%).[41]
>
> 2. Decrease the support award to the custodial parent by that percentage for the period of time during which there is extended visitations; e.g.,

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[39] Robert Williams, Supra, II-60 and National Centre for State Courts, Supra, p. 467.

[40] The Child Support Assessment Scheme, Supra, p.26.

[41] In Canada the study on the reasonable estimate of expenditures on children would determine what the appropriate percentage for food and recreation would be.

decrease payment by 30% for one month if non custodial parent has one month extra visitation.

3. Or, calculate decrease based on the percentage by which those expenditures for that period of extended visitation decrease the custodial parent's total yearly expenditure. For example, if the extended visitation is for one month (4.3 weeks):

$$\frac{1 \text{ month}}{12 \text{ months}} \times 30\% \text{ expenditures} = 2.5\% \text{ of total yearly expenditures}$$

OR

$$\frac{4.3 \text{ weeks}}{52 \text{ weeks}} \times 30\% \text{ expenditures} = 2.5\% \text{ of total yearly expenditures.}$$[42]

The advantage of this formula is that it compensates the non-custodial parent for the increase in expenses incurred for the child in cases of extended visitations.

The major problem, however, is that the formula does not take into account the additional expenditures on children living in two different households, as the economic evidence is based upon expenses on children in intact households. Furthermore, this approach does not recognize the "fixed costs" of the "secondary" custodial parent. Finally, where both parents have equal income and share the children in equal proportion, this formula would not be viable.

B. Split Custody: Both parents have at least one child in their custody:

In split custody cases, it may be believed that each parent should assume the total expenses of the child within his or her care. This approach would be equitable if both parties have the same number of children in their care, if they have an identical income and if each child within their care has identical needs. If not, each parent's means and the children's needs should be considered and support awarded in accordance. An offset should be done for the parent who owes more than what he or she personally incurs for the child in his care.

Under American child support guidelines:

> "the separate obligations are determined in much the same manner as if there were independent sole custody situations. An exception is that both the Colorado and Washington guidelines pro-rate the separate obligation based on the total number of children. That is if there is one child with one parent and two children with another, the obligation for the one child is based on one-third of the schedule amount for three children rather

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[42] Karen Getman, Supra, p. 136-137.

> than the schedule amount for one child. This approach treats the three children as a group and takes into account the economic evidence that spending on children increases less than proportionately with the number of children."[43]

The disadvantage of this approach is that it does not take into account that in split custody situations we are faced with duplicate costs because of the higher costs of caring for the children in separate households. In order to remedy this problem, separate calculations could be made for both groups of children.

In Australia, split custody situations are dealt with through the same formula as in the case of shared physical custody.[44]

Regarding this issue the following question should be addressed:

- How should joint physical custody, extended visitations and split custody situations be handled?

ISSUE # 6: CHILD CARE EXPENSES

Child care (day care, etc.) is an important child-related expense, particularly in the early years, *often equivalent to the rest of the child support order*. There are basically two ways of dealing with child care expenses, either including them in the formula or counting them separately.

Options

If the economic evidence used as a basis for the chosen formula took into account the costs of child care, the simple application of the formula would include these costs. This option has been chosen for example in the State of Wisconsin and in Australia.

However, evidence of expenditures on children could omit these costs in order to treat them separately. Many existing guidelines do treat child care separately because this type of expense varies significantly with time as well as within different families and regions. It may, therefore, seem easier and more equitable to divide these costs between parents as they occur. It is also felt that treating them separately maximizes the custodial parent's benefit of working.

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[43] Robert Williams, Supra, p. II-60.

[44] Child Support Assessment Scheme, Supra, p. 26.

Another advantage of treating this expense separately is that a formula which would allow adding on the actual amount which is paid per year by the custodial parent would be more representative of actual costs than a formula which provides for only average child care expenditures.

Unlike other types of expenses, the parties and the judges currently know the amount of this expense and do not underestimate it. Amounts paid on child care are easily established by providing specific evidence or receipts. This is unlike other types of expenditures on children, which are difficult to determine on an individual basis and which must be determined as average costs by research.

If actual child care costs are not compensated separately but simply included within the formula, not only will the child support order be based upon average population costs as opposed to actual costs of the custodial parent, but costs will be averaged over the years of the support order.

As child care costs may be so much higher in the early years and therefore represent for these years a large proportion of the costs of children, compensating within the formula may be unfair to custodial parents and could even serve as a disincentive for custodial parents to work.[45]

Regarding the issue of child care costs, the following question is asked:

- How should child care costs be accounted for under child support guidelines?

ISSUE # 7: EXTRAORDINARY HEALTH EXPENSES

The issue of medical and health related expenses in Canada is limited to extraordinary expenses which are not covered by the provincial or territorial health insurance plans, such as dental and/or orthodontal costs, particular treatments, psychological and emotional counselling, medications, disabled children or children with special needs, etc.

Since these costs will arise only in certain families and may be quite expensive, computing them within a guideline could result in inadequate child support awards for children with special needs.[46]

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[45] Robert Williams, Supra, p. II-50.

[46] Robert Williams, Supra, p. II-62.

As discussed with child care, extraordinary health expenses could be computed outside any type of formula for determining support and the costs divided between the parents in proportion to their ability to pay.

Also, where a parent pays special insurance premiums to cover the child's medical expenses, the amount of these premiums could be added to the costs of the child and divided in proportion to each parent's percentage of contribution.

Regarding health expenses:

- How should extraordinary health expenses be considered under child support guidelines?

ISSUE # 8: DEFINITION OF "CHILD"

The research studies of expenditures on children (currently underway) may not provide any financial information on children over and above the age of majority. Therefore, child support guidelines should address the issue of adult children who remain dependant due to special needs or for educational purposes.

If child support guidelines are established, it may be useful to develop a uniform definition of children who have a right to support, which could be applied throughout Canada. Under the present system, no such uniform definition exists, although it is generally recognized that while pursuing their studies children will have the right to receive support from their parents.

However, certain questions should be addressed in dealing with this issue:

- Should children have the right to support during graduate studies or should support stop after the first degree?

- Should a child have the obligation to work part time and during the summer months to pay for a portion of his or her expenses? Should any consideration be given to the type of studies undertaken (e.g. a medical student may not be able to work part time)?

- Should this issue remain discretionary with some guidance to the judiciary?

- What type of guidance would be needed?

- Should the support order remain in existence when the child achieves the age of majority or should it terminate automatically, leaving the burden of seeking a new support order to the child?

ISSUE # 9: VARIATION OF SUPPORT ORDERS

In studying the issue of variation of support orders, there are three separate matters which must be addressed: criteria for variations, the process to deal with such variations and the treatment of current child support orders following the implementation of child support guidelines.

A. Criteria for variations

Under the present approach to determining child support, whether under provincial or territorial legislation or under the *Divorce Act*, the criteria to justify a variation is the establishment of a change in the means, needs or other circumstances. Such change, however, usually has to be "material" or "significant" to justify a variation of the order. This test is usually established by a material or significant change in the parents' means or in the children's needs. Currently, higher costs for older children may not necessarily justify an increase in the child support order unless they are extraordinary expenses. Furthermore, unless a jurisdiction specifically provides for cost of living adjustment clauses to account for inflation, inflation may not by itself justify an increase in child support orders.

The main disadvantages of the present test are: that it is rather difficult to establish, it does not necessarily take into account two factors which may be important to preserve the buying power of the child support order (age and inflation), and it leaves a considerable amount of discretion to judges. Therefore, child support guidelines could seek to redefine the test for variation of child support orders. There could be three factors justifying the variation of child support orders under guidelines: where re-application of guidelines produces a different child support award exceeding a certain threshold, inflation, and age of children (higher costs for older children).

(i) Where a re-application of the guidelines produces a different award:

Under child support guidelines, a change in the means of the parties should remain as a ground to vary child support orders. However, the requirement to establish a "material" or "significant" change of circumstance could be removed. Instead, an order could be varied where re-application of the guideline produces a different child support award, should that change exceed a specified threshold. Therefore, this test would generally justify variation of orders where the parties means have either increased or decreased. However, the establishment of a specific threshold would prevent parties from seeking variations where changes in their means are insignificant. The only problem with this approach is that it may be difficult for a party to determine whether or not a re-application

would produce a different award without having the other party's financial statement.

(ii) Inflation:

If support orders are not updated to account for inflation, within a few years they can lose a considerable amount of buying power. In certain Canadian jurisdictions, cost of living adjustment clauses are already being used to prevent the erosion of support orders. An advantage of such clauses is that they offer a guarantee that child support orders will increase every year at the same rate as inflation if no other circumstance justifies an additional increase.

(iii) Age of children (Higher costs for older children):

Support orders may also become outdated by the fact that as children grow older they cost more. In the United States, evidence of expenditures on children has demonstrated that expenses on children increase as they grow older. Canadian studies on expenditures on children are now examining this issue. If that is the case, the budget originally submitted when the support order was originally made is not representative of future expenses. Therefore, unless child support guidelines account for the age of the child, as time goes by support orders would erode and both children's and custodial parents' standard of living would decrease. Custodial parents would gradually incur a greater portion of the children's financial responsibility and at the same time non-custodial parents' standard of living would increase since they are not required to contribute to these increasing costs.

B. Process for dealing with variation of support orders

The present approach to updating child support orders does not provide children with a process to ensure that as they grow older child support awards will continue to be equitable with respect to all circumstances. Furthermore, the current process for the variation of orders can also seem unfair to child support payors and recipients in that where parents' incomes increase or decrease, it is unlikely that they voluntarily inform one another of the changes. Parents, therefore, have no means of confirming the other's income before actually applying for a variation and receiving a statement of income and expenses.

Applying for a variation also means being faced with legal costs which may often be more than what the increase or decrease in support would represent for a given year. These legal costs often serve as a deterrent to seeking variation orders even where the parties may be able to prove a definite change of circumstances. The result is that most support orders will remain at their original

level for years unless they are subject to cost of living adjustment clauses and unless such clauses are actually applied.

Furthermore, where non-custodial parents suffer a decrease in income, they may let the arrears accumulate only to seek a retroactive reduction once their financial situation allows them to incur the legal fees involved. During such time, custodial parents, who have been counting on the support payment, have to seek enforcement and may eventually have to fight a motion to retroactively reduce arrears. The amount of arrears can become considerable and support recipients have to do without to compensate for the missed payments. In cases where retroactive reductions of arrears are ordered, custodial parents and children can be seriously penalized.

In the United States, by 1993, every child support order being enforced by child support agencies will have to be regularly re-assessed under the guidelines. Although there is no provision for other child support orders, Congress is studying the issue. In most States, the support enforcement agencies will be in charge of administratively processing these cases. Parties will be allowed to appeal to the courts or agency if dissatisfied with the determined amount.

In Australia, child support orders are re-assessed every year by the administrative office, and it is also possible for non-custodial parents to obtain a review of their child support order any time if new family responsibilities arise.

Child support guidelines could create a specific process to deal with variation of child support orders. The following four alternatives could be considered for dealing with variations: the creation of a presumption for cost of living adjustment clauses and for age adjustments, a yearly re-determination, a self-reporting system, and a combination of different options.

(i) Creation of a presumption for cost of living adjustment clauses and age adjustments:

The negative impact of using the court process could be significantly limited if the legislation created presumptions in favour of cost of living and age adjustments (if there is evidence that expenditures on children in Canada increase with age). Such adjustments would go a long way to keeping the orders current, while allowing provincial enforcement agencies or custodial parents to collect on the higher adjusted amounts. Either parent could, however, rebut the presumptions by court application, seeking to reapply the formula on the basis of an increase or decrease in either parents' income level.

Cost of living adjustments could take effect on January 1 of every year, or on the date of the anniversary of the support order or agreement (this complicates the process). If a presumption was created for cost of living

and age adjustments it would be preferable, from an administrative viewpoint, if a uniform adjustment date was established for all cases without exception.

A problem with relying solely on a presumption to update orders is that there is no way to ensure that increases would actually be applied unless the orders were being enforced through provincial support enforcement offices. Since many child support recipients might not be aware of the existence of the presumption nor of the amount of adjustment every year, a system may have to be established to inform custodial and non-custodial parents every year of the rate of adjustment.

Relying solely on a presumption for cost of living and age adjustments may not, however, offer children equitable levels of child support. In effect, the award might not necessarily increase the amount in proportion to the non-custodial parent's increase in income. Furthermore, where parents' incomes increase at a lower rate than the cost of living, such a clause would impose on a parent a child support award higher than would have been awarded if the guidelines were actually re-applied.

(ii) Yearly re-determination of child support through an administrative office:

This option, which was adopted in Australia, would capture, on a regular basis, the changing needs of the children as they get older, as well as parental increase and/or decrease in income. It would prevent to a certain extent accumulation of large amounts of arrears.

An administrative office would review all cases where parties apply for modification of support orders. The office would study each case and send in a suggested revised support order. If the parties are not satisfied, they could appeal and meet (without a lawyer) in front of an administrative officer who would hear the parties and decide to either review or maintain the modified support order. If the parties are still not satisfied they could then appeal to the courts.

However, such a system may be costly to set up and run. Furthermore, both custodial and non-custodial parents may not view a yearly re-application positively, since it may not allow them to budget for more than a year ahead and would force them to go through the trauma related with support determinations every year.

(iii) Creation of a self reporting system:

A process could be established to provide for ways of signalling increases and decreases in parents' incomes. An obligation could be created whereby parent's would be compelled to send, every year, a copy of their

income tax return and all relevant attachments to the other parent to identify possible increases and decreases in income.

The parents could then calculate themselves whether the increase of income, since the last support determination, would amount to the determined threshold (as discussed in section A.(i) above) or to a level which would change their income category, therefore justifying a review of the order.

Before going to court for a variation the parties could try reaching an agreement, since they have all the necessary information in their possession. However, if the parties cannot reach an agreement, they would have to resort to the judicial system.

The problem with this approach would be to ensure that the parents actually send each other the relevant information. In some American states where demonstration projects tested periodic reviews and modification, the results suggested that such exchanges of documentation between parties may not be practical.

(iv) Combination of different options:

Different combinations of the possible options could be devised. For example, a presumption for cost of living and age adjustments could be applied every year until the parties seek a re-application of the guideline following receipt of the other's yearly personal financial report. This option could be carried out using the court process, as litigation would be limited due to the pre-determination of amounts of child support according to the parents' income. However, one problem with leaving the determination of child support in the hands of the court process, as witnessed in the United States, is that child support amounts are negotiated under the guidelines amount in order to avoid the legal fees involved in litigation.

The questions to consider on the issue of variation of support orders are:

- Should a formula adjust for changes in parents' means, inflation and age of children?
- Should guidelines allow for variation of orders where re-application produces a different amount?
- Should the variation be granted notwithstanding the difference in the award or should a threshold be specified?
- What would be an acceptable threshold?

- Should variation of support orders be accomplished as part of the formula by using a presumption for age and inflation, through application to the courts or an administrative office, or by using a combination of different options?

C. Treatment of existing child support orders following the implementation of any new system to determine child support

Should child support guidelines be implemented, the adequacy of the amounts of pre-existing child support orders would become an issue. If custodial parents have to establish the present criteria of "change in circumstance" to have these orders varied, children with existing support orders would be treated differently than children with child support orders awarded under any new law.

Therefore, the question must be asked: should all pre-existing child support orders be subject to the application of any new method of determining support? A positive answer to this question appears to be an equitable way of treating all Canadian children by not granting preferential treatment to some because of the date of their family's breakup. Militating against this approach, however, is the issue of just how the courts could be expected to handle such a volume of cases.

Further, in the few cases where a child support order established under guidelines would be inferior to the present child support award, reducing the amount in accordance would amount to penalizing these children unduly. Such amounts were either agreed to by the parties or determined by the courts which, in these particular cases, did not underestimate the cost of raising these children. Conversely, some would argue that support guidelines should be applied to every order.

Where previous child support orders were clearly minimized in exchange for global settlements, should this be considered in the modification process?

ISSUE # 10: EXTENT AND LIMITS OF CHILD SUPPORT GUIDELINES: ADVISORY, PRESUMPTIVE OR MANDATORY

There are different ways of implementing child support guidelines: they can be advisory, presumptive, mandatory, or a combination of these approaches.

A. Advisory:

An advisory formula could be implemented which would leave the courts with as much discretion as they presently have, but which would simply serve as a guide

to help determine child support awards. Such a method of implementing guidelines would have the advantage of giving judges tools to work with. Results, however, may still be inconsistent in comparable family situations and inadequate due to the continuation of judicial discretion.

B. Presumptive:

A formula could be applied as a rebuttable presumption (i.e. applied unless there are reasons to deviate). The reasons to deviate would be specified in a general manner and the courts would evaluate whether there is justification to depart from the guidelines. For example, deviation from the formula could be justified where, due to particular circumstances, applying the guidelines would yield obviously inequitable results. An advantage of this approach is that all individuals would be treated in the same manner according to the guidelines unless a party convinces a judge that the circumstances in his case justify a deviation from the guidelines.

C. Mandatory:

The chosen formula could be mandatory. Judges would have to apply the formula no matter what particular circumstances arise. An advantage of this method is that everyone would be treated equally with respect to child support orders. However, this approach may, in some cases, generate inequitable results, without any remedy.

D. Others:

Another possible option (depending upon the chosen formula) is to have a combination of the mandatory approach and the judicial discretion approach. The amount of the child's basic needs could be determined and be mandatory in all cases. Judicial discretion could however remain for any amount over and above the amount of the child's basic needs. The advantage of this approach is that it would ensure that every child would be awarded at least the amount for his or her basic needs. The disadvantages of this approach would be that the basic needs could become the norm, and any additional amount the exception. Even if additional amounts were awarded, it may be difficult to ensure that they represent a reasonable estimate of the expenditures on children if no guidance is provided. The amounts awarded may remain too low (since the system is not changed much) in proportion to parental means.

Another alternative (depending upon the formula) could be the implementation of guidelines where the determined child's basic needs are mandatory but where the percentage over and above is presumptive. This could ensure the child's

basic needs in the award and the additional amount would also be awarded unless there are serious reasons for not doing so.

Consequently, if child support guidelines are adopted how should they be implemented?

5. ANOTHER RELATED ISSUE: COMPENSATION FOR CUSTODIAL PARENT'S NON-FINANCIAL CONTRIBUTION

An issue which deserves to be addressed in a study on child support, but which has not been included in any existing child support guideline, is that of non-monetary costs of custody to custodial parents and whether such costs should be compensated. This issue, which is overlooked under the present approach for determining child support in Canada, has raised a number of criticisms.

> "One of the reasons why allocating a strictly proportionate share of child care costs to the custodial parent appears unfair is because no credit is given in the *Paras* calculation to the non-financial contributions that the custodial parent makes in the form of on-going care. Even if the costs of daycare or babysitting are taken into account in assessing the costs of child support, the imputed costs of parental care are not. This is the second inequitable aspect of the *Paras* approach, which results in women bearing a disproportionate share of the costs of child care unless spousal support is provided to compensate for performance of this role".[47]

Different American and Canadian studies have estimated child-care and housework at approximately 20-27 hours per week.[48] For example the Report by the Canadian Advisory Council on the Status of Women entitled Women and Labour Market Poverty[49] includes the following chart:

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[47] Rogerson, Carol J., Supra, p. 100

[48] Diane Dodson, *Report Card on State Child Support Guidelines*, p.15. and Canadian Advisory Council on the Status of Women,.*Women and Poverty*, p. 26.

[49] Canadian Advisory Council on the Status of Women, *Women and Labour Market Poverty*, p. 26.

Wife's Labour Market Status	Husband (hours)	Wife (hours)
Non-employed wives		
Housework and child care	5.5	36.3
Labour market work	40.8	0.0
Total work	46.3	36.3
Employed wives (full-time)		
Housework and child care	6.6	16.0
Labour market work	37.5	32.7
Total work	44.1	48.7

The above numbers (which are determined on the basis of two-parent families) show that where a wife is employed in a two parent family, her husband will work 6.6 hours a week on housework and child care and she will work 16.0 for a total of 22.6 hours per week. In the case of a single mother, for example, the 22.6 hours per week would have to be done by her alone. From that total number of hours, however, a deduction would have to be made to account for the time she would have spent on these chores had she not had custody of the children. Even if this amounted to as much as 25%, 22.6 - 25% = 16.95 hours of work per week spent on behalf of the children.

Although the above chart specifies the "wife's" portion of work, it is fair to assume that single custodial fathers would have to perform the same number of hours on behalf of their children.

It is important to recognize that this type of contribution is made after the parties' relationship has ended and has nothing to do with being a spouse but is, rather, directly related to the custody of the children.

The questions to consider regarding this issue are, therefore,:

- Should the non-financial contribution of custodial parents be compensated or is this an inherent cost of custody which is to be compensated by the emotional and personal advantages of having the children on a regular basis?

- If the non-financial contribution should be compensated, how could it be evaluated in terms of money?

6. CONCLUSION

The purposes of this Discussion Paper are to review the need for changes to the current law of child support, to examine alternatives to the current law and the related issues, and ultimately, to seek the reader's input on the substantive issues raised in the paper. These views will, in turn, assist the federal, provincial and territorial governments to develop a new approach to child support.

This Paper will be followed within six months by a second report outlining the results of research to determine a reasonable estimate of expenditures on children, and comparing the application of different formulae using this data. Only after the second report will it be possible to determine a preferred approach regarding child support guidelines. At this point, only comments on issues of substance which may eventually assist in the choice of model and which will help determine which issues should be considered in developing basic guideline models are sought.

To assist in the process, you are invited to review this document and respond to the issues raised in it, such as:

- is the present system adequate?
- if not, what alternative approach should be adopted?
- are the proposed objectives and principles of child support appropriate?

With respect to child support guidelines:

- how should parents' minimum needs be accounted for?
- should there be minimum child support orders?
- what should be the relationship between parental income and means, and the measure of the child's needs?
- when should income be attributed?
- how should multiple family situations be dealt with?
- how should joint and split custody situations be handled?
- how should child care and medical expenses be accounted for?
- should a formula adjust for age of children, inflation, changes in parents' means?
- if so, how should this be done: as part of the formula (age, inflation); administratively, or through the courts?

- if child support guidelines are adopted, how should they be implemented?

With respect to the related issue of custodial parents' non-financial contribution:

- should this non-financial contribution be compensated, and how?

Comments and submissions may be sent to:

Child Support Project
Federal/Provincial/Territorial Family Law Committee
c/o Department of Justice
Room 738
239 Wellington Street
Ottawa, Ontario
K1A 0H8

and to your own provincial or territorial Attorney General's Department or Department of Justice.

ANNEX "A"

A. TYPES OF GUIDELINES:

(i) Sweden

Sweden has integrated the public and private law system of financial support for children. It provides for basic financial security for children within its Social Security System but both parents remain responsible for the "reasonable maintenance" of their children. The "needs of children" is the fundamental principle underlying the Swedish system but the child's income, assets and child benefits are considered.[30]

A "basic sum" is used as a reference to calculate Social Security benefits. This indexed sum corresponds to the annual income equivalent to the national old age pension. To calculate child support payments, a statutory formula has been developed and guidelines established by the National Board of Health and Social Welfare which incorporate cost of living for children of different age groups (i.e. 0-6, 7-12, and 13 and over) and are expressed percentages of the basic sum. From that amount the child's State allowance is deducted.

A "reserved amount" may be deducted by the debtor parent for his maintenance plus reasonable housing costs and a further amount may be deducted for the support of a second family. The creditor also has the right to deduct these amounts although it is not stated in the statutes. The child support is determined by the following formula:

$$\frac{\text{remaining income of the non-custodial parent (NCP)}}{\text{remaining income of the NCP} + \text{remaining income of the custodial parent}} \times \text{amount calculated for the child(ren)'s needs} = \text{non-custodial parent's monthly payment}$$

It is felt that the levels of awards are now more uniform but that the system is somewhat complicated.[31] The maintenance will terminate when the child reaches the age of 18. However, if the child is still in school the obligation will remain until the age of twenty-one.[32] Step-parents have a secondary responsibility to biological parents. A child may receive a standard additional amount where parents are left with a significant surplus.

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[30] David Bradley, *Financial Support for Children, The Swedish Example*, September (1990), Family Law, p. 349-351.

[31] Bridge, Karen L., *An International Survey of Private and Public Law Maintenance of Single Parent Families*, Status of Women Canada, November 1985, p.23-27.

[32] Translation to English, Stockholm, January 1984, extract from the principle articles of the *Code* relating to parents, guardians and children. P. 22.

(ii) The United States

In the United States, Congress passed in 1984 the Child Support Enforcement Amendments, which required all States to establish guidelines for determining the amount of child support awards by October 1, 1987. Different types of child support guidelines are now in use in the United States: the Income Shares Model, the Flat Percentage of Income Model and the Delaware-Melson Formula. Another formula which has been developed in the United States but which has not been adopted by any State is the Equalization of Standards of Living Model.

(a) The Income-Shares Model:

This model of guidelines has been developed by the federal Child Support Guidelines Project staff and is the most popular formula in the United States. It has been adopted integrally or in modified form in 31 States. This model is also known as a resource sharing model. The basic principle behind the Income Shares Model is that a child should receive the same amount of parental income which he was receiving before the family breakdown in proportion to each parent's income. The most important element of the Income Shares model is the economic study of expenditures on children which ultimately determines what amount represents the children's share of total parental income.

The formula works as follows: Both parent's income is determined and the guideline amount for the children is then prorated between them in relation to their income. Child care expenses and extraordinary medical expenses are treated separately and are also pro-rated in proportion to the parents income. The amount is then added to their total obligation. This model has been adopted using both the net or the gross income of parents and where any of the parent's income is $500 or less per month a minimum award between $20 and $50 per month will usually be awarded.[53] In the State of Washington the Income Shares model has been adopted with age adjustments factors. It is the only State where this has been done. Different schedules are therefore included for children ages 0-6, 7-15, 16-17.[54]

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[53] Robert Williams, *Development of Guidelines for Child Support Orders*, U.S. Department of Health and Human Sciences, September 1987, p.II-68.

[54] Ibid, p. II-viii.

Example:

For the purposes of this example we will assume that we are establishing an order for two children living in the State of Colorado.

1) Determine Income of father = $30,000

2) Determine Income of mother = $15,000

3) Determine Total Parental Income = $45,000

4) Determine joint child obligation as established by guidelines = 31.2% x $45,000 = $14,040

5) Pro-rate child obligation between parents:
   (a) father = $14,040 x .66% = $9,266. per year (or $772.16 per month)
   (b) mother = $14,040 x .33% = $4,633. per year (or $386.08 per month)

If father is the non-custodial he would then pay $9,266/year or $772.16 /month in child support + proportion of child care expenses and extraordinary medical expenses.

If the mother is the non-custodial she would then pay $4,633/year or $386.08 per month in child support + proportion of child care expenses and extraordinary medical expenses.

(b) The Delaware (Melson) Formula:

This formula is one of the first formulae to be created in the United States. Judge Elwood F. Melson adopted this formula in 1979 in the Delaware Family Court. Delaware, however, revised its original formula in 1990. This model, which is quite complete and very workable, has only been adopted in three States: Delaware, Hawaii and West Virginia. Its lack of popularity is attributed to the fact that it is perceived as being more complex than other models. The formula is known as a hybrid cost-resource sharing model.

The main objective of the formula is to ensure that the parents will first be allowed a self-support reserve at poverty level ($550 per month in the state of Delaware) before being required to pay child support. All remaining income will then be devoted to cover the child's "primary child support" which is also set at poverty level ($220 in Delaware) and which will be apportioned between parents in relation to all remaining income. The children will then have the opportunity to share in any surplus income of the non-custodial parent as determined by the guidelines "standard of living adjustment (sola)". In the State of Delaware, the sola percentages are: 18% for one child, 27% for two children, 35% for three children and 5% for each additional child.

Example:

For the purposes of this example we will assume that we are establishing a child support order for one child in the State of Delaware (U.S. funds):

1) Determine net monthly income of father: $2,000

2) Determine net monthly income of mother: $1,000

3) Subtract self-support reserve:
   (a) father = $2,000 - $550 = $1,450
   (b) mother = $1,000 - $550 = $ 450

4) Determine primary child support through guidelines: $ 220

5) Prorate between parents:
   (a) father's capacity is .76 = $220 x .76 = $167.20
   (b) mother's capacity is .23 = $220 x .23 = $ 50.60

6) If mother is custodial: determine remaining income of father and calculate standard of living adjustment:
   $1,450 - $167.20 = $1,282.80 x 18% = $230.90

7) If father is custodial: determine remaining income of mother and calculate standard of living adjustment:
   $450 - $50.60 = $399.40 x 18% = $71.89

8) Total child support obligation of father if mother is custodial:
   $167.20 + $230.90 = $398.10

9) Total child support obligation of mother if father is custodial:
   $50.60 + $71.89 = $122.49

(c) The Flat Percentage of Income Model:

This method of determining support is definitely the simplest of all child support models. This formula has been adopted in 16 States including Wisconsin where it originated. It is known as a cost-sharing model due to the fact that the percentages are determined in accordance with research on expenditures on children. The formula attributes a specific percentage of the non-custodial parent's income to be paid as child support for all levels of income. This model operates under the assumption that each parent will devote the determined percentage of his or her income on their children. However, the formula does not expressly include the calculation of the custodial parent's share.

There is no provision within this formula to add on child care and extraordinary medical expenses; rather, it is assumed that they are included in the established percentage. Further, there is no specific self-support reserve but it is assumed that the difference between the parent's total income and the specified percentage for child support will serve this purpose. Complex cases such as joint physical custody and the presence of other dependants are treated separately.

This model is being used with net or gross income. In Wisconsin the determined percentages of gross income are: 17 percent for one child, 25 percent for two children, 29 percent for three children, 31 percent for four children, and 34 percent for five or more. [55] In Illinois, the net income is considered and the percentages are: 20, 25, 32, 40, 45 and 49 percent.[56]

A variation of the percent of income model is adopted in Minnesota where the established percentage of income increases with the income level of the non-custodial parent. The determined percentages will vary from 14% to 50% depending on the income level and the number of children.[57] In Texas the percentages are used to determine a range of support.[58]

Example:

For the purposes of this example lets assume that the child support is being established for two children in Wisconsin.

(i) If father is non-custodial:

Determine father's income: $30,000

Determine established percentage: 25%

$30,000 x 25% = $7,500 per year or $625 per month

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[55] National Centre for State Courts, *Child Support Guidelines: A compendium*, March 1990, p. 1000.

[56] Ibid, p. 225.

[57] Ibid, p. 519.

[58] Judge R. James Williams, *Child Support, (An Update and Revision of Quantification of Child Support)*, (1989) 18 R.F.L. 234, The federation of Law Societies of Canada and The Canadian Bar Association 1990 Family Law Program, Calgary, Alberta, May 1990, p. 77.

Mother is also assumed to be paying 25% of her income on behalf of the children.

(ii) If mother is non-custodial:

Determine mother's income: $15,000

Determine established percentage = 25%

$15,000 x 25% = $3,750 per year or $312.5 per month

Father is also assumed to be paying 25% of his income on behalf of the children.

(d) The Income Equalization Model:

This model, developed by Dr. Judith Cassetty, has not been adopted in any American state but has been widely discussed. The basic principle underlying this method is that the child should suffer the least reduction in his standard of living as a consequence of the family breakdown. The model, therefore, seeks to equalize the standards of living of both custodial and non-custodial households. Another principle behind this approach is that the children's standard of living cannot be disassociated from the custodial parent's standard of living.

The Income Equalization model exempts a poverty level of support for all members of both households, and all remaining income will be redistributed proportionally in accordance with the number of persons in each household. In this model the income of new spouses will also be considered in the determination of the award. This model is a resource-sharing model since its main object is to redistribute the resources between the two family units.

The method of determining the amount of child support award is as follows:

$$A = \frac{(CP \times NI) - (NP \times CI)}{NP + CP}$$

A = Award

CP = Custodial parent's cost of living under any standardized, cost-based measure such as the federal poverty guidelines produced by the Social Security Administration, or one of the three family budgets -- low, moderate, or high -- produced by the Bureau of Labour Statistics. (All are available by family size.)

NI = Non-custodial parent's household income (or imputed income)"

NP = Non-custodial parent's cost of living. (See above. The same standardized cost of living scale must be used for NP as for CP in order to maintain comparability.)

CI = Custodial parent's household income (or imputed income)

"The results of calculations based upon this formula should always be a child support award which, when transferred, produces identical income-poverty ratios between the two households."[39]

Example:

For the purposes of this example, assume that the "C.P." (cost of living at poverty level) for parent and one child is $750 per month ($550 for single adult + $200 for child). The non-custodial parent's household income is $3,000/month (the non-custodial parent makes $2,000 and the new spouse makes $1,000). The "N.P." would be $850/month (i.e rate for two adults sharing expenses). Finally the "C.I." (custodial parent's income) would be $1,000/month:

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[39] Judith Cassetty, G.K. Sprinkle, Ralph White and Bill Douglas, *The ELS (Equal Living Standards) Model For Child Support Awards*, from Essentials of Child Support Guidelines Development, Economic Issues and Policy Considerations, Proceedings of the Women's Legal Defense Fund's National Conference of the Development of Child Support Guidelines, May, 1987, p. 335-336.

$$\text{Award} = \frac{(CP \times NI) - (NP \times CI)}{NP + CP}$$

$$\text{Award} = \frac{(\$750 \times \$3,000) - (\$850 \times \$1000)}{\$750 + \$850}$$

$$\text{Award} = \frac{\$2,250,000 - \$850,000}{\$1,600}$$

$$\text{Award} = \frac{\$1,400,000}{\$1,600}$$

$$\text{Award} = \$875$$

The non-custodial parent would therefore be paying $875 in child support.

Although this model has not been adopted in any State, some guidelines contain certain aspects reflecting the philosophy behind this model. By way of judicial discretion these guidelines allow the courts to adjust the support where the two households have great disparities in standards of living. This is the case of Tennessee, Vermont, New York and the District of Columbia.[60]

(iii) Australia

Australia was also plagued with problems similar to those found in the United States and in Canada with respect to child support. This led to major reform of their system to determine and enforce child support. The establishment of awards is now income-based and the payment of child support is effected by the Commonwealth and collected from support payors as a tax through employers.

Under Australia's system there are six different versions of the child support formula:

1. The basic formula where one parent has sole daily care of all the children and has an income below average weekly earnings. (Average annual earnings are $26,125 Australian, $1 Cdn is worth .9172 Australian).

2. A formula taking into account the liable parent's obligation to support his or her natural or adopted children.

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[60] National Centre for State Courts, Supra.

3. A formula taking into account the custodian's taxable income where it is above average weekly earnings.

4. A formula applied to families where there is split and/or shared custody.

5. A formula used to assess how much each parent should pay a custodian who is not a parent.

6. A formula used to assess how much the parent with liability to several custodians pays each custodian.

The Australian formulae combine essential elements of the three basic american formulae. From the Income Shares formula it adopts the principle of using both parent's income and the established percentages are based upon research into family spending on children. However, the determined percentages do not decrease as income rises as in the Income Shares model, but rather as in the flat percentage of income formula the percentages remain constant in different income categories. The Australian formulae also adopt the concept of the parental reserve put forward by the Delaware-Melson formula, but children's total primary needs are not met before parents can benefit from a percentage of their remaining income.

Before giving specific examples of the operation of formulae # 1 and # 3 (the two most common formulae), certain definitions must be provided:

An Australian dollar is worth approximately .9172 Cdn.

Taxable income: This amount is based on a parent's taxable income (before tax and Medicare levi is taken out) for the tax year before last (as stated in the tax assessment). For child support to be paid in 1989-90 this means the taxable income in the tax return for July 1, 1987 to June 30, 1988.
Exemption: For parent with no natural or adopted children in their care, the single rate of exemption is $6,461 (Australian $) for the year 1989-90.

Average weekly earnings: The average weekly earnings is $502.40 for 1989-90 ($26,125 yearly). This amount is an estimate produced by the Australian Statistician.

Disregarded Income: Where the custodian has an income which is above average weekly earnings, allowance is made for the expenses of the custodian in caring for the children. The yearly equivalent of average weekly earnings is taken away from the custodian's taxable income. Then, an extra amount for child care costs is subtracted for each child, depending on the age of the child at the beginning of the financial year. This amount is tied to a percentage of yearly average weekly earnings. For the first or only child under six, this is 11.5% of yearly average weekly earnings; for each other child under six, it is 2.5%; for each child over six and under 12, it is 5%.

Adjusted income: The liable parent's adjusted income is his or her taxable income minus the exemption. The custodian's adjusted income is his or her taxable income minus disregarded income.

Child Support Percentages:
18 percent for one child
27 percent for two children
32 percent for three children
34 percent for four children
36 percent for five or more children.[61]

Formula #1:

For the purposes of this example we are determining child support for one child where one parent has sole daily care and has a taxable income below average weekly earnings.

1. Liable parent's taxable income = $30,000

2. Subtract exemption: $30,000 - $6,461 = $23,539

3. Multiply amount of step #2 by child support percentage = $23,539 x 18% = 4,237 or $353/month

Formula #3: For the purposes of this example we are determining child support for one child under six, where the custodial parent has a taxable income above average weekly earnings.

1. Liable parent's taxable income = $30,000

2. Subtract exemption: $30,000 - $6,461 = $23,539 = liable parent's adjusted income

3. Custodian's taxable income = $30,000

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[61] The Commonwealth of Australia, *The Child Support Assessment Scheme A User's Guide*, 1989, p. 79.

4. Subtract the custodian's disregarded income (average weekly earnings + additional amount for child care costs which are 11.5% of yearly (or weekly) average earnings for children under six)

   = $30,000 - ($26,125 + 3,004)

   = $30,000 - $29,129 = $871 = custodian's adjusted income

5. Subtract the custodian's adjusted income from the liable parent's adjusted income.

   = $23,539 - $871 = $22,668

6. multiply the result of step 5 by the child support percentage.

   $22,668 x 18% = $4,080.

7. Child support is $4,080/year or $340/month (or $4,448/year or $370.66/month (cdn))